No. 87-1773

In The

Supreme Court of the United States

October Term, 1987

PENDER COUNTY BOARD OF EDUCATION, et al.,

Petitioners,

vs.

EDWIN G. PIVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals decision violated established precedent by failing to make any holding as to whether the speech in question was a substantial or motivating factor resulting in the complained of transfer, and as to whether the respondent would have been transferred irregardless of his protected activities?

2. Whether the Court of Appeals' application of the *Pickering* balancing test substantially complied with the accepted and usual course of judicial proceedings as the decision (1) was based on facts in evidence and furthermore was not based on unresolved questions of material facts decided in the first instance by the Court of Appeals in Respondent's favor without benefit of factual findings by the District Court and (2) is not inconsistent with this Court's recent decision in *Rankin v. McPherson* and other decisions of this Court and several of the Circuit Courts?

3. Whether the Court of Appeals held that the community interest in the content of a public employee's speech provides that speech with absolute first amendment protection, regardless of its form or context, and whether the Fourth Circuit erroneously interpreted this Court's decisions and is in conflict with other Federal Circuit Courts?

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The Respondent, Edwin G. Piver, opposes Petitioners' Request for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit and respectfully submits this Response:

STATEMENT OF THE FACTS

Edwin G. Piver, the Respondent, has been employed as a social studies teacher in the Pender County School system since the year 1966-67. His teacher evaluations have always been favorable and have usually been outstanding (R. 342-344). There had

never been any problems with Piver as a teacher. At the time of the events complained of in this case, he was Chairman of the Social Studies Department at Topsail Junior-Senior High School.

In the late part of 1981 and early 1982, the Pender County School Board, according to the deposition testimony of the Board members, had received complaints about Ralph Jourdan, the principal at Topsail Junior-Senior High School, at a time when it was in the process of deciding whether or not he should be granted tenure. While principal Jourdan had been given good evaluations by M. D. James, the Pender County School Superintendent (R. 210). In early 1982 a number of meetings were held by the School Board itself and also in conjunction with the Topsail Advisory Council (R. 210).[1] The Respondent was a loyal supporter of Jourdan, his principal, whom he felt to be a good, professional educator.

In March, 1982, the plaintiff and his wife, Kay Piver, met with Board Chairman J. J. Smith three times to speak in support of Jourdan but were told by Smith that Jourdan was not going to be granted tenure (R. 817, 918-922).[2] The Topsail Advisory Council met March 22 and 29, 1982 regarding Jourdan's tenure.

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[1] The School Board had set up "Advisory Councils" within each school district in the county to advise it on matters which related to the schools in the particular district.

[2] Smith is related to Mrs. Piver by marriage.

The Pender County Board of Education then called a joint public meeting of the Pender County Board of Education and the Topsail Advisory Council for April 8, 1982 regarding Jourdan's tenure. Prior to that meeting a number of the teachers at the school met with Piver and asked him to be their spokesman in support of Jourdan (R. 936). Another teacher who supported Jourdan placed Piver on the agenda for the meeting and Piver then prepared his own speech to be read at the meeting (R. 937). The joint meeting was held at Topsail High School in executive session without the presence of Jourdan; speakers, both pro and con were called in individually to speak (R. 937). At the appropriate time Piver gave his speech, which was supportive of Jourdan, in a respectful manner (R. 601). Piver had prepared the speech himself and had reviewed it with a number of the teachers to obtain their approval (R. 601). The meeting with the teachers, for which Jourdan had granted permission, was the only time Piver was ever out of his classroom on anything regarding Jourdan's tenure and it was done during the teachers' planning periods (R. 211).

At the hearing of April 8th, Piver also presented to the Board a petition which had been initiated by a student in Piver's government class (R. 947). Piver had no role in the preparation or circulation of this petition; Hoffman had come to Piver and had asked what would be wrong with the students initiating a petition on behalf of Jourdan to which Piver responded that it would be his right to do so under the First Amendment (R. 947).

Board Chairman Smith had encouraged people who had complaints against Jourdan to come to the meeting of April 8th and speak (R. 598). Smith acknowledged that there were a number of people in the school in support of Jourdan but he viewed the plaintiff as the leader because of his speech on April 8th (R. 628-629).

Immediately after the hearing of April 8, 1982, the plaintiff had a conversation with Superintendent of Schools, M. D. James who stated "Glenn, you would have been better off if you hadn't come here tonight." (R. 942). The Board of Education made no decision on the night of April 8, 1982, but met again on Easter Monday, April 12, 1982, in executive session (R. 435). At that time Wanda Cherry, guidance counselor at the school, who had been a vocal critic of Jourdan and who had been encouraged to attend the meeting by both Smith and James, spoke out against Jourdan (R. 951). Miss Cherry was the only faculty member who ever spoke before the Board against Jourdan (R. 618). At the meeting the Board voted four to one not to grant Jourdan tenure. Although Jourdan could have remained as a teacher in the school system, he was told by James that he should resign or James would make it so difficult on him that he would never be able to find another principal's job (R. 213, 961).

Several of the Board members and Superintendent James in their depositions made vague references to the fact that they had received "complaints" regarding Piver's activities in support of Jourdan at the school. However, in none of their depositions were any one of them able to cite a single specific complaint which had

been made about Piver's activities. The vague references in their depositions were to Piver ostensibly having circulated a petition in his class in support of Jourdan, trying to unduly influence a student to support Jourdan, having taken some students off of a school bus in the morning and into the library to request them to sign a petition, and advising students to picket a school function. None of these activities ever occurred (R. 212).

After the Board terminated Jourdan, Piver and other persons living in the Topsail area met on a number of occasions and planned efforts to persuade the Board to reverse its decision; Piver spoke in support of Jourdan at several of the meetings which were held at the school (R. 963-964). Members of this group, including Piver, collected signatures on a petition to present to the Board asking that Jourdan be retained, and on May 3, 1982, representatives of the group met with the Board which refused to reverse its decision (R. 968).

During the period of time between March and May, 1982, when the Jourdan matter was proceeding to a conclusion, Piver occasionally talked to his students both individually and as a group about the Jourdan issue although he never initiated any of the discussions in his social studies classes (R. 969-970). The discussion would be initiated by a student and might proceed for five or ten minutes on occasions (R. 971). Though a petition in favor of Jourdan was brought into Piver's classroom at one time, Piver did not permit its circulation during class (R. 972). Never at any time during the process did Piver leave his class unattended while he

was discussing the issue of Jourdan's contract with any one (R. 974).

Piver's impression was that after the Board had made its final decision, most everyone at the school tried to put it behind them and get on with the end of the school year (R. 980). As far as Piver was concerned once a decision had been made, even though he disagreed with it, he was ready to put it behind him (R. 981). No directions were ever given by the Board of Education to Superintendent James as to what if anything he was to do about Piver. The Board, in fact, took no action of any kind during this period of time either regarding Piver or any other teacher (R. 640). Smith did indicate however in his testimony that James was "concerned about suppressing the situation" and that James had admitted in so doing he might be stepping on some people's constitutional rights (R. 631).

The School Board election was scheduled for June, 1982. At that time the defendants J. J. Smith, R. E. Brown and Wilbert Henry were up for re-election. In the election Smith was opposed by Twila Jones, Brown by Dr. Brenda Rivenbark and Henry by a Mrs. Harrell (R. 991). Piver supported all three of the challengers (R. 991). He talked to other individuals in his community and solicited their vote against the incumbents and for the challengers (R. 991). The Board members knew there was opposition to Smith and Brown in the Topsail community both before and after the election (R. 375, 642-644). Smith talked to fellow Board member Henry about it and specifically stated that he thought that the plaintiff and his family were working to defeat

him because Smith had been against Jourdan (R. 376-377).

In addition to Piver's support of the challengers in the June, 1982 School Board election, his wife, Kay, worked for the challengers, Jones and Rivenbark (R. 711).

After the election, Smith accused Kay Piver of election irregularities and filed a protest (R. 726). The hearing on the alleged election irregularities was held before the Board of Elections of Pender County one of whose members was Etha Piver, Piver's mother, and the lone Republican member of the Board of Elections at that time. After the hearing, the protest was disallowed by the local Board of Elections and upheld by the State Board of Elections.

The school year ended in early June, 1982. The School Board and Superintendent then proceeded to hire a new principal for the Topsail Junior-Senior High School. The new principal was Thomas Benton, who was hired as of July 1, 1982. Neither the School Board members nor Superintendent James discussed with the new principal anything about any difficulties which they might anticipate at the Topsail Junior-Senior High School with Piver or his possible transfer to another school with the exception that the Chairman Smith had approached Benton about the matter and Benton told him specifically that Piver should not be transferred (R. 214). Benton anticipated no problems with Piver during the 1982-1983 school year and there were none (R. 214). No one at anytime, either from the Pender County School Board or from the office of the Superintendent

ever conferred with Piver regarding the possibility of any anticipated difficulties or a possible transfer (R. 423, 653). Piver never had any notice or indication that his employment would be discussed at the July 26, 1982 meeting; it was not even on the agenda. No investigation whatsoever was ever made by the Board or any of its members regarding any alleged complaints, difficulties, or other problems which might have either been associated in the spring of 1982 or anticipated during the 1982-83 school year regarding Piver and his employment as a teacher at the Topsail Junior-Senior High School. At the meeting on the 26th James made no recommendation that Piver be transferred. The matter of Piver's transfer was handled very quickly when after some brief discussion the Board voted unanimously to transfer him to Atkinson Junior High School with Smith making the motion (R. 656). This was out of the course of the normal operations regarding transfers of school personnel between one school as such transfers are usually handled administratively by the Superintendent and none of the Board members in their testimony could recall any other transfer having been made by the Board without some recommendation by the Superintendent during their respective tenures (R. 660-661). None of the other teachers supporting Jourdan were transferred nor was Miss Cherry (R. 661). Piver lived in the Topsail community within one (1) mile of the Topsail School and the transfer to Atkinson Junior High School resulted in an eighty (80) mile round trip for him (R. 1001). A letter dated July 27, 1982, was sent to Piver by Superintendent James stating that he was transferred to Atkinson; the letter did

not state what Piver would be teaching at that school (R. 340). Piver was certified to teach social studies only on a secondary level and according to his teacher's certificate was not certified to teach anything in junior high school (R. 1001-1004). Piver talked to Gary Lesh, the principal at Atkinson, to find out what he would be teaching since school would be starting shortly; Piver found out that the only courses available to teach would be in seventh grade science and physical education (R. 1002). Piver had no courses in teaching science or physical education and in addition has an artificial foot, loss of several fingers on one hand from an accident and arthritis (R. 1002). When Piver visited Lesh at Atkinson Junior High School, Lesh had a letter typed up to the Assistant Superintendent stating that the only courses available at Atkinson were courses in seventh grade science and physical education (R. 1002).

Approximately one week after the transfer had been made, Evelyn Wells of Hampstead, North Carolina, called Smith and asked why Piver had been transferred; Smith called her back and said that it was "politics" (R. 208-209). Smith also stated to Mrs. Wells that if he could have found a place for Kay Piver he would have transferred her also (R. 1016).

The plaintiff proceeded to file a grievance and hired the law firm of Trawick and Pollock as his attorney (R. 1005). After a meeting with the School Board on August 10, 1982, he was told that if he would sign a loyalty

oath he would be retransferred to Topsail (R. 340, 1036).[3]

The plaintiff believed that the loyalty oath deprived him of his First Admendment rights to free speech and his better judgment told him not to sign it; however, his wife was extremely upset and he realized the hardship on her as well as the additional hardship and expense of having to make an 80 mile round trip to Atkinson and signed the statement against his better judgment; the letter was then placed in his personnel file (R. 1039-1040). The 1982-83 school year proceeded smoothly and there were no problems between Mr. Benton, the new principal, and Piver. Later Piver requested that the letter be removed from his personnel file, but the School Board refused by a three to two vote. The letter was finally removed over a year later after Piver was represented by new counsel and again requested its removal.

REASONS FOR DENYING THE WRIT

In a long line of decisions beginning with *Pickering v. Board of Education*, 391 U.S. 563 (1968) this Court

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[3] The statement dated August 10, 1982, read as follows:

Gentlemen:

You have my assurances that I will cooperate fully with Mr. Thomas C. Benton, the new principal at Topsail High School, that I will perform my teaching duties and assigned responsibilities to the best of my ability, and that I will support the Board of Education in the implementaion of its policies and decisions.

Sincerely yours,

/s/ Edwin G. Piver

set forth the standards which determine whether a public employees' speech is protected by the First Amendment. The analysis essentially is made using the standards on a case by case basis depending upon the factual situation presented by each case. Though such an analysis may, at first blush, seem to at times produce results which might not always be completely reconcilable, it is not because, as Petitioners would contend that there is confusion among the Circuit Courts on the proper procedure to be followed, but is instead due to the many varied factual situations presented to the courts, such as the one here. In this case, Petitioners ask this Court to issue its Writ to resolve what appear to be essentially factual matters. The proper procedure has been well defined by this Court. The manner in which the Fourth Circuit Court of Appeals decided this case, based on the issues before it, was in accord with the proper procedure as delineated by this Court and with the other Circuit Courts of Appeal.

I. THE COURT OF APPEALS DECISION DID NOT VIOLATE ESTABLISHED PRECEDENT BY FAILING TO MAKE ANY HOLDING AS TO WHETHER THE SPEECH IN QUESTION WAS A SUBSTANTIAL OR MOTIVATING FACTOR RESULTING IN THE COMPLAINED OF TRANSFER, AND AS TO WHETHER THE RESPONDENT WOULD HAVE BEEN TRANSFERRED IRREGARDLESS OF HIS PROTECTED ACTIVITIES.

The Fourth Circuit Court of Appeals has determined by applying the analysis set forth in a long

series of cases decided by this Court that the Respondent's speech addressed an issue of public concern[4] and that the Respondent's speech, in applying the balancing test, outweighed any perceived harm caused to the Petitioners' interests in running the Pender County School system.[5] This ruling is not in conflict with any decision of other Circuit Courts or the decisions of this Court.

In a long series of cases this Court has clearly delineated the analysis to be followed in balancing a public employee's rights to free speech under the First Amendment to the Constitution and the government's interest in promoting the efficiency of public services. It is clearly established that a state may not discharge an employee on the basis that infringes on that employee's Constitutionally protected interest in freedom of speech. *Perry v. Sinderman*, 408 U.S. 593, (1972). A determination of whether a public employer has properly discharged an employee for engaging in a speech requires "a balance between the interests of the [employee] as a citizen in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Connick v. Myers*, 461 U.S. 138, 140, (1983). This policy recognized that "vigilence is necessary to insure that public employers do not use their authority

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[4] Appendix to Petition at P. 9a, *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1080 (4th Cir. 1987).

[5] Appendix to Petition at P. 11a, *Id.*, at 1082.

over employees to silence discourse not because it hampers public functions but simply because superiors disagree with the content of the employee's speech." *Rankin v. McPherson*, 97 L.Ed.2d 315, 324 (1987).

The threshold question in analyzing the question as set forth in *Pickering* and in *Connick* is whether the employee's speech may be "fairly characterized as constituting speech upon a matter of public concern." *Connick*, 461 U.S. at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the context, form and content as revealed by the whole record." *Id.*, at 147-148. In this case, the District Court found that the Respondent's speech did not address a matter of public concern and stopped its inquiry at that point by granting summary judgment in the favor of the Petitioners.[6] The Court of Appeals disagreed and held that the Respondent's presentation of his thoughts on the Jourdan tenure issue at a public School Board meeting called for the purpose of soliciting input on the issue, the guiding of class discussion and participation in his social studies class and private conversations with the Chairman of the School Board and other teachers addressed an issue of public concern.[7] This Court's review of the determination of the Courts below is limited by its obligation to assure that the record supports that particular Court's conclusion. *Rankin v. McPherson*, 97 L.Ed.2d at 325. The record in this case clearly reveals that the conclusion of theCourt of Appeals is amply supported as it clearly

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[6] Appendix to Petition at P. 21a.

[7] Appendix to Petition P. 8a-9a, *Id.*, at 1082.

reveals the erroneous decision of the District Court on this threshold issue. "Whether an employee's speech addresses a matter of public concern must be determined by the context, form and content of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-148. This is the exact analysis performed by the Court of Appeals as it carried on an examination of the content, form and context of the Respondent's speech and compared that context, form and content with the employee's speech in *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir. 1968), relied on both petitioners and then concluded as a matter of law that the Respondent's speech was an issue of public concern.[8]

Though the District Court had granted summary judgment in favor of the petitioners based upon its conclusions that the Respondent's speech was not a matter public concern and therefore did not reach the second half of the two pronged analysis to determine the protected speech - the "balancing" inquiry - the Court of Appeals addressed it as a question of law and regarded the record below as sufficient to enable it to rule on the issue correctly. The record before the Court of Appeals included the deposition testimony of all of the School Board members, Superintendent James, Wanda Cherry, Gary Trawick, Kay Piver, Assistant Principal Robert Kermon and the Respondent, along with the affidavits of Evelyn Wells (R. 208), Ralph Jourdan (R. 212), and Thomas Benton who succeeded Jourdan as the principal (R. 214) plus the Respondent's

[8] Appendix to Petition at P. 8a, *Id.*, at 1080.

answers to the Petitioners' Interrogatories and Request for Production of Documents (R. 215). In other words the Court of Appeals, just as the District Court, had before it the testimony of practically everyone with any relevent knowledge of the facts of this case. In addition, the parties thoroughly briefed the issues, of the "balancing" inquiry before the Court of Appeals. With the record before the Court of Appeals, its conclusion that the balance tipped in favor of the Respondent was well supported by the evidence in the record. The inquiry into the protected status of speech is one of law, not fact. *Connick*, 461 U.S. at 148, n. 7.

The Petitioners now complain and urge on this Court as reason to grant the Writ that the Court of Appeals did not employ what the Petitioners would term a four-pronged analysis and complain essentially of the lack of a holding by the Court of Appeals itself or an affirmative direction on remand by the Court of Appeals to the District Court to decide (1), whether the Respondent's speech was a substantial or motivating factor in the decision to transfer him and, (2), if so, whether the School Board would have taken the same action based on other grounds. Petitioners rely on the langunge in *Mt. Healthy Cty. School District v. Doyle*, 429 U.S. 774 (1977), and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). As to these two questions the Court of Appeals merely made no holding on either, both of which are questions of fact.

After discussion which led the Court of Appeals to determine the Respondent's speech was a matter of public concern and that the balance tipped in favor of the Respondent in the balance inquiry, it then went on

to address two other issues which had been raised by the Petitioners before that Court, that is, whether there were any compensatory damages and whether the Respondent had compromised and settled his claim.[9] Both of these issues had been raised in the Court of Appeals by the Petitioners. The Court of Appeals then remanded for a determination of the compromise and settlement issue and damages stating that on remand that if the District Court determined that the Respondent did not compromise and settle his claim against the defendants then the District Court must analyze the damages that Respondent incurred on the basis of the injury to the interests protected by the First Amendment.[10] The opinion in no respect failed to require Respondent to prove that his protected free speech activities were a substantial or motivating factor in his transfer or precluded the Petitioners from offering a defense that Respondent would have been transferred irrespective of his protected activities. The opinion simply did not address those two factual issues for they had not been raised by the Petitioners in either their Memorandum in Support of Defendants' Motion for Summary Judgment before the District Court (R. 116-156) nor in their brief before the Court of Appeals.

Furthermore, and even more importantly, the record is completely devoid of any evidence which would even raise a material issue of fact as to whether the Respondent's speech activities were a substantial or motivating factor in his transfer or that he would have

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[9] Appendix to Petition at P. 11a-15a, *Id.*, at 1082-83.

[10] Appendix to Petition, P. 13A, *Id.*, at 1083.

been transferred for some other lawful reason otherthan him exercising his protected activities. To the contrary, all of the competent evidence in the record points unerringly to one conclusion which is that the Respondent was transferred for his protected activities and that but for those activities he would not have been transferred. No other reason for the transfer was ever offered at any place in the record of this case. This is quite unlike the factual situation of the employee in *Mt. Healthy* who had made an obscene jesture to female students, or in *Hamer v. Brown*, 831 F.2d 1398 (8th Cir. 1987), cited by the Petitioners where the reason for not renewing the contract of the public employee professor was a marked and pronounced decline in enrollment which occurred prior to his speech activities and where there was evidence that the University Chancellor did not even know about the Professor's speech until the termination of the appeal process had been done. In this case there is no evidence to the contrary that but for the protected speech of the Respondent as discussed in the opinion of the Court of Appeals, no adverse personnel action would ever have been taken with regard to his employment.

The Petitioners therefore mislead this Court by attempting to obtain a reversal of the decision of the Court of Appeals on an issue which factually does not exist nor one which they have ever raised and therefore cannot be heard to say that the Court of Appeals' decision is in conflict with the decisions of this Court nor the other Federal Circuits. The Court of Appeals had no obligation on remand to direct the District Court to review two nonexistent issues.

II. THE COURT OF APPEALS' APPLICATION OF THE PICKERING BALANCING TEST DID NOT SUBSTANTIALLY DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS THE DECISION (1) WAS BASED ON FACTS IN EVIDENCE AND FURTHERMORE WAS NOT BASED ON UNRESOLVED QUESTIONS OF MATERIAL FACTS DECIDED IN THE FIRST INSTANCE BY THE COURT OF APPEALS IN RESPONDENT'S FAVOR WITHOUT BENEFIT OF FACTUAL FINDINGS BY THE DISTRICT COURT AND (2) IS NOT INCONSISTENT WITH THIS COURT'S RECENT DECISION IN *RANKIN v. McPHERSON* AND OTHER DECISIONS OF THIS COURT AND SEVERAL OF THE CIRCUIT COURTS.

Though the District Court granted the Petitioners' motion for summary judgment on the basis of its holding that the Respondent's speech did not involve a matter of public concern and did not address the *Pickering* balancing inquiry, the Petitioners in their brief before the Court of Appeals raised the issue of the *Pickering* balancing test and urged it as an alternative basis for affirming the decision of the District Court. One must surmize that the Petitioners must have considered the record sufficiently developed so as to afford the Court of Appeals the opportunity to decide the issue as a matter of law. The decision having now been made by the Court of Appeals adversely to the Petitioners, they complain that the Court of Appeals made the decision at all and seek reversal by this Court.

As set forth in *Rankin*, cited by the Petitioners, the role of the reviewing court is to insure that the record supports the lower court's conclusion that the

employee's statements and the circumstances under which they were made are of a character which the principles of the First Amendment protect. The Court of Appeals in this case correctly recognized, when the issue was raised by the Petitioners, that when the employees' and audiences' interests in the speech at issue outweigh the harm caused by the speech to the Petitioners' interests in running the school system, the speech is constitutionally protected. It correctly recognized that the Respondent's speech consisted of speaking once before an open meeting of the School Board and the Topsail School Advisory Council, attending a Board meeting after the decision not to grant Jourdan tenure, meeting privately with the Chairman of the Board of Education on Jourdan's behalf on three occasions, guiding discussions on the issue during his government classes and allowing a petition in support of Jourdan to be circulated. As the speech was all directed to a matter which was clearly of public concern in the community it was entitled to greater weight in the balancing test then that of the employee in *Connick* where the Court emphasized that "we caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Connick*, 461 U.S. at 152.

Viewing the evidence as taken from the record of the whole, the Respondent's speech in this case did, without question, more substantially involve a matter of public concern as it did not involve at all the personal employment situation of the Respondent and was brought about as a matter of heightened community interests throughout the Topsail community and the

Topsail School by the Board itself when the Board and its members solicited public input and the efforts to deny Jourdan tenure became public knowledge. It is obvious from the record that Board Chairman Smith was soliciting adverse comment on Jourdan, as he even showed Respondent letters he had collected, and furthermore both he and Superintendent James had encouraged Wanda Cherry, the Guidance Counselor at the school, to attend and speak against Jourdan at the Board of Education meeting on April 12, 1982, at which Jourdan was denied tenure. During the time when the decision on Jourdan's tenure was a matter of concern throughout the community, it likewise became a matter of concern among the students at the school who as could be expected were interested in the outcome. As correctly found by the Court of Appeals, the Respondent allowed students to circulate a petition, clearly their right, and at their request presented that petition when he spoke at the School Board meeting and also allowed from time to time short discussions on the issue, again a relevant topic to the students, especially those in a government class. There is no evidence in the record that the Respondent was disruptive in any way, though the Petitioners seek to continue to characterize his conduct as "disruptive". During their deposition testimony, the School Board members and Superintendent James made vague references that they had received certain "complaints" about the Respondent's activities, but not one of them in their testimony could identify a single, solitary specific complaint nor could either one of them point to a single disruptive incident caused by the Respondent. The record clearly reveals

that neither the Board nor the Superintendent ever made any investigation into the alleged complaints prior to the Respondent's transfer on July 26, 1982. To the contrary, the Respondent testified to exactly what his activities consisted of, which were as set forth in the opinion of the Court of Appeals, and there is no competent evidence in the record to refute it. After the Jourdan tenure decision was made, the school year proceeded normally until the close of the year around the first of June; there is no competent evidence to refute that. Nothing happened until Board Chairman Smith and Board member Brown were defeated in the June election. Then at the very next meeting of the School Board on the 26th, the Respondent was summarily transferred despite the fact that Superintendent James had not recommended it, the only time that the School Board members and Superintendent James could recall a transfer being made without a recommendation by the Superintendent, and in spite of the recommendation of the new principal, Thomas Benton, to Chairman Smith that the Respondent not be transferred.

The Court of Appeals therefore did not base its decision on facts not in evidence nor did it resolve disputed facts in the Respondent's favor. The issue of the balancing test is a matter of law and the Court of Appeals correctly, just as urged by the Petitioners, viewed the record before it as sufficient to decide the issue as a matter of law. In so doing, the Court of Appeals likewise did not violate any of the directions of this Court as set forth in *Rankin* in conducting its review of this case. The review conducted by the Court

of Appeals was of a record sufficient to rule as a matter of law. It correctly examined the statements in issue and the circumstances under which they were made to see whether they were of a character so as to be protected by the Fourteenth Amendment. *Rankin*, 97 L.Ed.2d at 325. The balance was then struck in favor of the Respondent as a matter of law. The record supports the Court of Appeals conclusion and it should not be disturbed by this Court.

III. THE COURT OF APPEALS DID NOT HOLD THAT THE COMMUNITY INTEREST IN THE CONTENT OF A PUBLIC EMPLOYEE'S SPEECH PROVIDES THAT SPEECH WITH ABSOLUTE FIRST AMENDMENT PROTECTION, REGARDLESS OF ITS FORM OR CONTEXT, AND THE FOURTH CIRCUIT DID NOT ERRONEOUSLY INTERPRET THIS COURT'S DECISIONS AND IS NOT IN CONFLICT WITH OTHER FEDERAL CIRCUIT COURTS.

On this issue, the Petitioners indeed clutch at straws. As correctly recognized by the Petitioners in their petition this Court in *Connick*, 461 U.S. at 138, ruled that employees speech would be protected if it was on a matter of public concern and that the "public concern" issue was a threshold question to be decided as a matter of law. Contrary to the position of the Petitioners, the Court of Appeals made no holding that "community interest in the content of a public employees speech provides that speech with absolute First Amendment protection regardless of its form or

content." To the contrary, the Court of Appeals scrupulously applied the direction of this Court in analyzing the "content, form and context, of the Respondent's speech."[11]

The Court of Appeals had previously recognized in *Burger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir. 1985) that cases involving "private personnel grievances" should be excluded from First Amendment protection and should be screened out when the aggrieved employee has spoken out about his own employment situation when the employment situation holds little or no interest for the public at large.[12] The decision in *Burger*, and in this case, were therefore in accord with the long line of decisions of this Court, including *Connick*. The Court of Appeals in this case never held that the level of community interest *determines* (emphasis added) whether the issue is a matter of public concern, though, as that court correctly recognized, that such community interest is a factor in comparing cases like this with others which are mere private personnel grievances. In fact, the Court of Appeals applying the "content, form and context" approach as directed by *Connick* and analyzing in that light each of the speech activities of the Respondent, found those activities to be a matter of public concern and not a mere private personnel grievance not entitled to First Amendment protection.

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[11] Appendix to Petition at P. 8a, *Id.*, at 1080.

[12] Appendix to Petition at P. 7a, *Id.*, at 1080.

CONCLUSION

For these reasons, a writ of certiorari should not be issued to review the judgment and opinion of the Fourth Circuit Court of Appeals.

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